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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1003

COUNTY OF IMPERIAL, CALIFORNIA, and the SUPERIOR COURT OF CALIFORNIA, in and for the COUNTY OF IMPERIAL,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, JUAN DE LEON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

JAMES H. HARMON,
County Courthouse,
939 W. Main St.,
El Centro, Calif. 92243,
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the court of appeals is reported at 604 F. 2d 1174 (9th Cir. 1979) and printed as Appendix "A" to the petition for certiorari. (A 1-8.) The preliminary injunction issued by the district court (B 1-11) is not reported.

JURISDICTION.

The judgment of the court of appeals was entered on July 26, 1979, and a petition for rehearing was denied on October

17, 1979. The petition for certiorari was filed on December 27, 1980 and was granted on February 25, 1980. Jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTION PRESENTED.

The California Supreme Court ruled the owner of a water well estopped from challenging an export restriction in his conditional use permit and bound by its terms. The question presented is whether third party merchants, residing in Mexico and desiring to purchase water from the well owner for export, may invoke the jurisdiction of the federal courts to enjoin enforcement of the particular use permit export restriction.

STATEMENT.

General Background.

In 1976, W. Erle Simpson (''Simpson'') applied to the County of Imperial (''county'') for a use permit authorizing the sale of water from a well on his premises. The subdivision in which Simpson's parcel was located was governed by deed restrictions providing the lots were to be used for residential purposes. (C 2.)[1] When Simpson applied for his permit, an interim zoning ordinance required a permit for any land uses other than those specifically exempted, and county officials notified Simpson he was required to obtain a permit in order to conduct a commercial water sale business. (C 2.)

Public hearings were initially held on the application before the planning commission, and subsequently, before a joint meeting of the planning commission and the board of

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[1]The opinion of the California Supreme Court in *County of Imperial v. Donald C. McDougal* setting forth certain facts referred to herein is reported at 19 Cal. 3d 505, 564 P. 2d 14 (1977) and is printed as Appendix ''C'' to the petition for certiorari. (C 1-11.)

supervisors. At the commission meeting, two other landowners in the tract argued against the granting of the permit on the ground it would interfere with the quiet enjoyment of their property, and the county's chief planning officer recommended against granting the permit for the same reason. (C 3.)

At the joint meeting of the planning commission and board of supervisors, Simpson, who was represented by counsel, voluntarily withdrew from his application a request to export water to Mexico. (C 6.) Thereafter, a use permit was issued authorizing water sales subject to the restriction the water would be sold only for use within the county. (C 1.)

Simpson did not challenge the export restriction and he accepted the benefits afforded by the permit and conducted himself in accordance therewith. (C 6.) Between 1968 and 1972, only a few tank trucks were loaded with water from the well, and Simpson sold a total of approximately 500,000 gallons of water in those years. (C 3.) In 1970, the tract was zoned for low intensity use and the zoning allowed development of natural resources for commercial purposes only upon the issuance of a conditional use permit. (C 1.)

In June, 1972, Donald C. McDougal ("McDougal") purchased the parcel from Simpson. McDougal was aware of the permit restriction against sale of water for export from the county and knew Simpson had not made intensive commercial use of the well. (C 3.)

McDougal requested the board of supervisors to remove the export restriction from the use permit, but he was advised a new conditional use permit would be required to accomplish this result. (C 3.) Without applying for a new permit, McDougal entered contracts to sell water for distribution in Mexico, and beginning in July, 1972 as many as 44 trucks

a day, with a capacity of 250,000 gallons, loaded water at the well day and night. (C 3.)

Neighboring landowners protested the noise and fumes generated by the traffic and county officials demanded McDougal discontinue his operation. (C 3.) Thereafter, he applied for a permit, but with insistence his application was without prejudice to any subsequent claim no permit was required. The permit was denied, and McDougal unsuccessfully appealed the denial to the board of supervisors. (C 3.) McDougal nevertheless continued his commercial export operation.

State Court Proceedings (and McDougal Appeal to This Court).

The county sought injunctive and declaratory relief against McDougal in the Superior Court of the State of California in and for the County of Imperial (''superior court'' or ''trial court''). The suit alleged McDougal was violating zoning by selling water for export and by employing tank trucks to carry large amounts of water from the well. (C 1.)[2]

In partial response to the county's application for preliminary injunction, McDougal filed a declaration of Guillermo Gallego Munoz (''Munoz''), his broker for sale of water in Mexico, asserting water from the subject well was necessary to meet needs of residents of Mexicali, Mexico. (64a-66a.)[3] The superior court directed an investigation

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[2]A second cause of action alleged the manner in which McDougal operated his business constituted a public nuisance; and a third asserted McDougal was violating the County's Ground Water Appropriation Ordinance. (C 1-2, fn. 2.) The third cause of action was by stipulation bifurcated and not tried. (*Id.*)

[3]Munoz's declaration alluded to the fact another well in the county at Ocotillo was used for export of water to Mexico but he asserted it ''did not satisfy the needs of the people of Mexicali''. (64a.)

made concerning the assertion and thereafter determined "a satisfactory showing [was] made that the issuance of [a] preliminary injunction will not deprive Baja California of needed drinking water . . ." (26a-27a.) A preliminary injunction was thereafter issued. (*Id.*)

Following trial, the superior court entered judgment enjoining McDougal, "his heirs, successors, assigns, agents, servants, and employees and all persons acting in concert with or for him, from conducting a trucking operation on the premises similar to that which occurred commencing on or about June 30, 1972". (28a.) Findings of fact and conclusions of law were adopted by the trial court. (56a-63a.)

Testimony received in opposition to Simpson's original application was referred to in the findings. (58a.) The findings noted one resident "argued against allowing an intensive operation on the premises such as was occurring some eight miles to the north at Ocotillo where a well owner was selling large quantities of water to distributors who hauled water from the well site to Baja California, Mexico". (*Id.*; also see reference to the Ocotillo well in the declaration of Munoz at 64a.)

In granting the injunction, the trial court rejected McDougal's argument the export restriction in his use permit was invalid. The court found "[t]he condition imposed in Simpson's 1967 permit was not intended to directly burden or interfere with the international commerce. Any effect on international commerce, caused by the . . . permit restriction . . ., would be merely incidental to a valid exercise of police power designed to regulate local land uses in the interest of general welfare". (62a.)

The California Supreme Court thereafter agreed to hear McDougal's appeal. In proceedings before the State Su

preme Court, Munoz was permitted to file an *amicus curiae* brief. (67a-78a.) Munoz also filed a response to the *amicus* brief filed on behalf of the county by the State Water Resources Control Board and San Francisco Bay Conservation and Development Commission (79a-84a); and, his counsel joined McDougal in orally arguing before the California Supreme Court.

The State Supreme Court partially affirmed the trial court judgment by holding McDougal bound by the export restriction in the use permit and estopped from challenging its validity. (C 6-9.)[4] The estoppel against McDougal resulted from a showing the out-of-county sale prohibition was not challenged by Simpson and his request to export water to Mexico was voluntarily withdrawn from the permit application. (C 6.) Due to the estoppel, the court concluded it was unnecessary to determine whether the export restriction was violative of the Commerce Clause, as urged by McDougal. (C 6, fn. 3.)

McDougal filed a petition for rehearing and for stay pending results of his petition for certiorari to this Court. (85a-93a.) The State Supreme Court denied the petition. (C 11.)

Thereafter, McDougal appealed to this Court and also applied for stay and supersedeas. The application was denied on October 17, 1977. (*Donald C. McDougal v. County of Imperial*, 434 U.S. 899, 54 L. Ed. 2d 187, 98 S. Ct. 294.) The appeal was dismissed for want of a substantial federal question on November 14, 1977. (434 U.S. 944, 54 L. Ed. 2d 306, 98 S. Ct. 469.)

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[4]The California Supreme Court reversed the trial court's judgment to the extent it determined McDougal violated the 1970 zoning ordinance by allowing large numbers of trucks to haul water from the well and enjoined him from operating his business in this manner. (C 9.)

Subsequent Federal Court Proceedings.

Respondents Munoz, Martinez and de Leon reside in Mexico and desire to purchase water from McDougal for export to Mexico.[5] In July, 1977, they filed an action in the United States District Court for the Southern District of California ("district court") seeking to enjoin the county, certain of its officers, and the superior court from enforcing the export restriction in McDougal's use permit. (1a-25a.)

Respondents asserted the export restriction violated the Commerce Clause and argued the state courts erred in the *McDougal* decision. Their complaint alleged *inter alia* "[t]he action by the County of Imperial, the State Supreme Court of California and the Superior Court of the State of California . . . is in direct contradiction to and is invalid pursuant to [the Commerce Clause, Art. I, §8, cl. 3, of the United States Constitution]." (10a.)

Respondents moved the district court for a preliminary injunction and filed affidavits to support the motion. (32a-54a.) In opposition, the county argued the decision of the California Supreme Court in *McDougal* was *res judicata* and the Respondents' action was barred by the Anti-Injunction Act, contained in 28 U.S.C. §2283. (55a-93a; 94a-120a.)

A preliminary injunction was issued by the district court, in September, 1977, enjoining the county and its officers from enforcing the condition in McDougal's use permit prohibiting the sale of water for use outside the county. (B 12.) The district court concluded the Respondents were not "in privity" with McDougal and the doctrine of *res judicata*

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[5]Respondent Munoz has been McDougal's broker for sales of water in Mexico since 1972, and, under the brokerage contract, McDougal "agreed to sell water to persons referred to [McDougal's premises] by [Respondent Munoz]." (7a.)

was therefore inapplicable. (B 5.) The court further determined the action was not barred by the "Anti-Injunction Act" because it did not seek to enjoin a pending state court proceeding "but rather to restrain the enforcement of an allegedly unconstitutional ordinance". (B 2-3.)

McDougal resumed sales of water for export to Mexico upon the granting of the injunction by the district court.

The county appealed to the court of appeals and thereafter unsuccessfully sought stays in separate motions filed with the district court and court of appeals. The court of appeals finally expedited determination of the appeal after the district court indicated disposition of the appeal prior to trial was desirable.[6]

The district court's judgment was affirmed on appeal. (A 1-8.) Because the California Supreme Court did not address the constitutionality of the export restriction in McDougal's use permit, the court of appeals concluded the state court decision was not a "final judgment on the merits" and thus not *res judicata* as to Respondents' action. (A 7.) The Ninth Circuit rejected the county's claim the Respondents' action was barred by the Anti-Injunction Act by concluding there did "not remain a last act necessary to effectuate the California Supreme Court judgment". (A 5.) The court further stated "[m]oreover, even if ongoing state proceedings remained, [respondents] here, not being parties to the state suit, may mount a constitutional challenge in federal court against the law which is the subject of these

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[6]During the pendency of the federal appeal, the superior court held McDougal in contempt of court for "knowingly selling water from the well on the . . . premises to persons and/or businesses who cause or allow the water to be transported for distribution and use outside the County of Imperial, particularly in Mexico". (D 2.) McDougal was ordered to cease the selling of water as described but execution of said order was stayed pending final resolution of the federal action. (D 3.)

state proceedings''. (A 6.) Finally, the court of appeals directed that the district court should determine the validity of the use permit export restriction in light of *Hughes v. Oklahoma*, ... U.S. .... ,60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979). (A 4, fn. 1.)

SUMMARY OF ARGUMENTS.

I.

The doctrine of *res judicata* precludes Respondents' collateral attack on the judgment of the California Supreme Court. Contrary to the conclusion of the court of appeals, *McDougal* is a final judgment on the merits as to the federal cause of action.

McDougal attempted to challenge the constitutionality of the subject export restriction throughout the state court proceedings. The State Supreme Court, however, found McDougal estopped because his predecessor agreed to and abided by the restriction and benefited from issuance of the permit. The estoppel is an adequate and independent ground for the state court decision.

Uses authorized for McDougal's parcel are governed by the terms of his use permit. Any rights of Respondents with respect to the parcel are derivative of McDougal's. Since McDougal, as owner, is bound by the out-of-county sales prohibition, Respondents must also be bound. Respondents cannot logically acquire greater rights with respect to ground water underlying the parcel than possessed by McDougal.

Determination of what constitutes a "cause of action" for purposes of *res judicata* turns on whether there is such a measure of identity between actions so that a different judgment in the second action would impair or destroy the first. The federal court judgment in favor of the Respondents purports to enjoin enforcement of the very restriction upheld by the State Supreme Court. It obviously impairs rights adjudicated in favor of the county and therefore Respondents' suit should be regarded as the same cause of action as litigated in *McDougal*.

Respondents' claim of error by the superior court and State Supreme Court does not sanction their indirect attack.

Asserted error does not prevent a final judgment on the merits from being *res judicata*.

Even though Respondents were not formally parties in *McDougal*, their interests are entwined with those of McDougal and they had the opportunity to participate with him in the state court proceedings. Indeed, Respondent Munoz actually did participate in the trial court proceedings and acted as *amicus curiae* before the State Supreme Court. Respondents are thereby bound by the decision in *McDougal* as participating "non-parties".

Respondents and the "whole world" are further bound by *McDougal* because the decision of the California Supreme Court constitutes a judgment *in rem*.

II.

The Anti-Injunction Act contained in 28 U.S.C. §2283 bars Respondents' action. Conclusions of the court of appeals that McDougal has complied with the decision of the California Supreme Court, and that no further enforcement actions are pending in the state court which may be affected by the federal injunction, are inaccurate.

McDougal is required by the terms of the State Supreme Court decision to refuse water sales to Respondents for sale to Mexico. Clearly, he is not complying with the judgment.

There are further enforcement actions pending or available in the state courts which are affected by the federal injunction. The superior court's contempt proceeding against McDougal is an example of such an enforcement proceeding.

The fact the district court fashioned its injunction against the county and its officers instead of against the state courts does not make the injunction any less violative of the Anti-Injunction Act. The Act is not avoided by framing the injunction against the parties rather than against the court.

Reliance by the district court and court of appeals on *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1938) is inapposite. There a third party stranger separately affected by a statute was permitted to bring a federal action to challenge the law although earlier state court proceeding had upheld the constitutionality of enactment.

In the present case, the Respondents are not strangers. They are instead contractors of McDougal. Respondents' interests are closely aligned with those of McDougal and legality of their agreements with McDougal depended on the decision in *McDougal*. Respondents had the opportunity to participate with McDougal in the state court proceedings; and, indeed Munoz did participate.

The present case involves no statute or ordinance of county-wide application under which Respondents' rights to engage in international commerce are affected. Instead, Respondents' action attacks the restriction in a specific use permit affecting a single parcel of land. As shown, the same restriction was ruled enforceable by the State Supreme Court and is the subject of enforcement proceedings by the superior court.

The case of *Vendo Co. v. Lektro-Vend Corporation*, 433 U.S. 623 (1977), wherein the Court reversed a district court injunction against enforcement of a final state supreme court judgment, should require reversal here.

III.

Direction by the court of appeals for the district court to determine the constitutionality of the subject export restriction in light of *Hughes v. Oklahoma*, ... U.S. .... , 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979) is erroneous. *Hughes* is clearly distinguishable.

Appellant Hughes was convicted in the state court for violation of an Oklahoma statute which prohibited export

outside the state of natural minnows procured from state waters. After the state appeals court affirmed, Hughes successfully appealed to this Court.

Hughes thus succeeded in his direct attack on the state court judgment. McDougal did not. McDougal's appeal to this Court was dismissed for want of a substantial federal question; and, the decision of the California Supreme Court is therefore a final judgment on the merits.

As argued above, the *McDougal* decision is *res judicata* as to Respondents' action and their suit is further barred by the Anti-Injunction Act. Neither of these issues were present in *Hughes*.

Respondents should not be allowed to relitigate whether the subject export restriction is enforceable. Assuming *arguendo* they somehow do have standing to challenge the restriction in McDougal's use permit, it is not clear *Hughes* should control.

This Court has recognized the right of a state, under its police power to prevent waters from non-navigable streams from being diverted outside the state in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908).

The district court attempted to distinguish *Hudson County Water Co.* on grounds it involved river water and riparian type rights not applicable to McDougal. The court relied on *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W.D. Tex., 1966), *aff'd.*, 385 U.S. 35 (1966).

City of Altus, Oklahoma should not be controlled because of the peculiar "rule of capture" applied to ground water in Texas. California courts long ago announced a "doctrine of correlative right" applying to percolating ground waters. (*Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663, 74 P. 766 (1903).)

The aforesaid correlative rights doctrine is similar to riparian rights rules applicable to certain streams and rivers. Thus, analogizing from *Hudson County Water Co. v. McCarter*, the county may be empowered to prevent exportation of ground water.

ARGUMENT.

I.

The Decision of the California Supreme Court in the McDougal Case Is Res Judicata as to Respondents' Action.

The California Supreme Court held McDougal estopped from challenging the export restriction in his use permit based on facts showing his predecessor agreed to and abided by the condition, and or benefited from issuance of the permit. (*County of Imperial v. Donald C. McDougal* (*supra*) C 6.) The Court ruled:

> ". . . [A] landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit. (*Edmonds v. County of Los Angeles* (1953) 40 Cal. 2d 642, 650 [255 P. 2d 772, 777]; *Zweifel Manufacturing Corp. v. City of Peoria* (Ill. 1957) 144 N.E. 2d 593, 595; *Psyhogios v. Village of Skokie* (Ill. App. 1972) 280 N.E. 2d 552, 556; *Skipjack Cove Marina, Inc. v. County Commissioners* (Md. 1969) 250 A. 2d 260, 265-267; *Stevenson v. Palmer* (Tenn. 1969) 448 S.W. 2d 67, 69; cf. *Naper Areo Club v. County of DuPage* (Ill. 1964) 197 N.Ed. 2d 1.) Thus, McDougal is estopped to assert that the prohibition in the Simpson permit against the sale of water for use outside the county is invalid, *and he is bound by the limitation*". (C 6, with emphasis added.)

Due to the estoppel, the State Supreme Court determined it was not necessary to determine whether the prohibition against the export of water was valid. (C 6, fn. 3.) In making

such a determination, the Court rejected McDougal's assertion civil rights authorities applied.[7]

In the subsequent federal litigation, the court of appeals concluded the California Supreme Court decision was not a "final judgment on the merits" so as to be *res judicata* as to Respondents' action. (A 7-8.) Specifically, the federal court stated:

> "A review of the California Supreme Court decision reveals that the issue of whether the County can constitutionally restrict the export of water was not reached by the court. (citation omitted.) There is thus no valid final judgment on the merits existing as to the cause of action in the instant case. As a result, the California Supreme Court decision would not have a *res judicata* effect in a case where proper parties, including even those in privity with McDougal, are directly challenging the permit's validity on constitutional grounds. Since the doctrine of *res judicata* extends only to issues that have been litigated on the merits, see *Smith v. Lujan*, 588 F. 2d 1304, 1307 (9th Cir., 1979); *Hooker v. Klein*, 573 F. 2d at 1357, it is not applicable in this case". (A 7-8.)

The reasoning of the court of appeals is fallacious.

Enforceability of the use permit export restriction *was* a central issue in the *McDougal* litigation. McDougal attempted to challenge the constitutionality of the restriction throughout the state court proceedings. (61a-63a.) As *amicus curiae*, Respondent Munoz also asserted in the state

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[7]The State Supreme Court found *Shelley v. Kramer*, 334 U.S. 1 (1947) "inapposite" and observed "*Shelley* did not involve the waiver of rights or the challenge to the validity of a condition relating to the economic value of a permit whose benefits the permittee sought and accepted. Nor can Simpson's right to export water from the county be analogized to the constitutional rights which the petitioners in *Shelley* sought to vindicate". (C 6, fn. 3.)

proceedings that the condition was violative of the Commerce Clause. (67a-86a.)

A final judgment on the merits for purposes of application of the doctrine of *res judicata* is one based on legal rights as distinguished from mere matters of practice, procedure, or form. (1B Moore's Federal Practice, *Res Judicata*, §0.409, citing *Swift v. McPherson*, 232 U.S. 51 (1914); *Clegg v. United States*, 112 F. 2d 886, 887 (CCA 10th, 1940) and other authorities.)

Estoppel *is* a valid and substantive ground for a state court decision.[8] the California Supreme Court's decision is

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[8]Estoppel was found by this Court to be an adequate and independent ground for state court decision in *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157 (1919). In *Enterprise*, the court refused to disturb a decision of the Nebraska Supreme court based on estoppel and dealing with the relative rights of parties to divert river water for irrigation. The court stated:

> "As has been shown, several questions were presented to the supreme court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the 14th Amendment, and another was whether the defense of estoppel in pais was well grounded. The first was plainly a Federal question and the other as plainly non-Federal . . . In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it (citations omitted).
>
> "It is not urged, nor could it well be, that, as a ground of decision, the estoppel is not broad enough to sustain the judgment." (243 U.S. 157, 163-165.)

Estoppel was also found to be an adequate and independent state ground in all of the following cases: *Pierce v. Somerset Railway*, 171 U.S. 641 (1898); *Lowry v. Silver City Gold and Silver Mining Co.*, 179 U.S. 196 (1900); *Utley v. City of St. Petersburg*, 292 U.S. 106, 111-112 (1933); *Beals v. Cone*, 188 U.S. 184, 196 (1903); *Hale v. Lewis*, 181 U.S. 473, 479-480 (1901); *Gillis v. Stinchfield*, 159 U.S. 658 (1895); *Michigan v. Flint*, 152 U.S. 363, 368 (1894); *Israel v. Arthur*, 152 U.S. 355, 362 (1894); *Sherman v. Grinnell*, 144 U.S. 198, 202 (1892); *Marrow v. Brinkley*, 129 U.S. 178, 181 (1888); *Adams Co. v. Burlington and Mo. River Railroad Co.*, 112 U.S. 123, 127-129 (1884). In *Mobile, Jackson and Kansas City R. Co. v. Mississippi*, 210 U.S. 187, 204 (1907) and *Rutland Railroad Co. v. Central Vermont Railroad Co.*, 159 U.S. 630, 640 (1895), this Court rejected appeals on said grounds even though interference with interstate commerce was alleged.

clearly a "final judgment on the merits" as to McDougal's rights under the use permit.

The decision holding McDougal cannot sell water from his premises for export must also logically prevent Respondents from purchasing water from McDougal for distribution in Mexico.

As shown, the right to use the subject parcel for commercial purposes depended on issuance of a conditional use permit. (C 1-2.) A conditional use permit is a special permit authorized under local zoning. (C 5, citing 3 Anderson, American Law of Zoning (2d ed., 1977), page 359.) Such a permit runs with the land (C 5, citing *Cohn v. County Board of Supervisors* (1955) 135 Cal. App. 2d 180, 184, 286 P. 2d 836, 839); and, by purchasing the parcel, McDougal succeeded to benefits enjoyed by Simpson under his permit. (C 5.) It is equally clear, however, McDougal became subject to the permit limitation and could assert no greater rights than possessed by Simpson. (*Id.*)

Respondents have been issued no use permit pertaining to the subject parcel. Any rights they have with regard to the parcel must be derivative of McDougal's. Since McDougal is bound by the export restriction, Respondents must necessarily be bound. Respondents cannot logically acquire greater rights than the owner of the land.

Various tests have been suggested for determination of what constitutes a "cause of action" for purposes of *res judicata*. They include ". . . whether 'there is such a measure of identity that a different judgment in the second [action] would destroy or impair rights or interests established by the first judgment' ". (1B Moore's Federal Practice, *Res Judicata*, §0.410.)

The present federal injunction purports to enjoin enforcement of the same restriction upheld by the California Su-

preme Court. It therefore obviously "destroys or impairs" rights earlier adjudicated in favor of the county. Under the rule announced, Respondents' suit must be regarded as the same cause of action as adjudicated in *McDougal*. "The purpose of the principle of res judicata is to end litigation. The theory is that parties should not have to litigate issues which they have already litigated or had reasonable opportunity to litigate. A reading of the early cases as compared with recent ones makes it clear that the meaning of 'cause of action' for res judicata purposes is much broader today than it was earlier. . . . " (*Williamson v. Columbia Gas and Electric Co.*, 186 F. 2d 464, 469-470 (5th Cir., 1950), cert. den., 341 U.S. 911 (1951); also see *Wilson Cypress Co. v. Atlantic Coast Line R. Co.*, 109 F. 2d 623, 627 (5th Cir., 1940), cert. den., 310 U.S. 653 (1940).)

McDougal had full opportunity to litigate the constitutionality of the subject export restriction in the state courts. Respondent Munoz actually participated in the state court proceedings. As seen, the California Supreme Court rejected their constitutional challenge and this Court dismissed McDougal's appeal. The decision in *McDougal* is therefore on the merits as to the Respondents' "cause of action".[9]

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[9]Authorities relied on by the court of appeals, including *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1954,) *Smith v. Lujan*, 588 F. 2d 1304 (9th Cir., 1979) and *Hooker v. Klein*, 573 F. 2d 1360 (9th Cir., 1976) (A 7-8) are not on point.

This Court in *Lawlor* ruled a prior consent judgment of dismissal with prejudice in a private anti-trust action did not bar a similar action based on subsequent acts of the defendant, since the subsequent wrong involved a new cause of action. (349 U.S. 326-330.) In *Smith*, the court of appeals concluded an earlier order of the Island Court did not bar a subsequent action in the district court for reexecution of a lease because the earlier order ". . . determined only that the court was without jurisdiction to order the [appellant's predecessor] to execute the . . . lease". (588 F. 2d 1307.) And, *Hooker* holds dismissal of a first extradition complaint is not *res judicata* as to a subsequent request. The court concluded a finding of extradition "is truly an interlocutory order, more akin to a preliminary hearing on criminal charges". (573 F. 2d 1367.)

Respondents' complaint asserts the decisions of the superior court and the California Supreme Court in *McDougal* are in error. (10a.) It is clear, however, claimed error does not sanction collateral attack. "If whenever a judgment were called in question, the court in this proceeding could review the matter previously adjudged to determine whether there had been error, a judgment would have no finality; immortal litigation would overcome mortal man; and the sound principle of fundamental repose, which underlies res judicata, would be subverted." (IB Moore's Federal Practice, *Res Judicata* §0.405 [4-1].)

Concededly, Respondents were not formal parties to the *McDougal* litigation.[10] It is submitted, however, they are bound as "non-parties" by the decision of the California Supreme Court under one or more of the theories advanced below.

Non-party participants are often bound by the outcome of litigation. As stated by Professor Moore, the rule is:

> "If a non-party who thus participates in litigation has an interest sufficiently close to the matter in litigation, and has adequate opportunity to litigate in support of or in defense against the cause of action on which the suit is based, the policies underlying the doctrine of judicial finality require that the participating non-party should be bound by the resulting judgment to the same extent as though he were a party to the action . . ." (IB Moore's Federal Practice, §0.411 [6].)

The principle of binding non-party participants to the outcome of litigation was upheld in a land title case by this Court in *Souffront v. La Compagnie des Sucreries de Porto*

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[10]The court of appeals did not, however, hinge its decision on any absence of "privity" as did the district court. (Compare B 5 with A 7-8.)

Rico, 217 U.S. 475, 487 (1909). The Court has recognized that identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be in legal effect the same. (*Chicago R.I. and Pac. R. Co. v. Schendel*, 270 U.S. 611 (1925); also see *Schnell v. Eckrich and Sons*, 365 U.S. 260 (1961).)

Recently, the Fifth Circuit Court of Appeals thoroughly discussed these principles in *Southwest Airlines Co. v. Texas Intern. Airlines*, 546 F. 2d 84 (1977)[11] The court stated "'. . . federal courts have repeatedly held that judgments can bind persons not party to the litigation in question. (citing cases.) At common law this preclusive effect extended only to those in privity with the parties. (citation omitted.) But federal cases have recognized that 'privity' denotes a legal conclusion rather than a judgmental process. Professor Vestal has explained:

> " 'Thus, the term privity in itself does not state a reason for either including or excluding a person from the binding effect of a prior judgment, but rather it represents a legal conclusion that the relationships between one who is a party on the record and the nonparty is sufficient to afford application of the principle of preclusion.' " (546 F. 2d 95 citing Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27 (1964).)

Respondent Munoz is and has been McDougal's "broker" for the sale of water in Mexico. (7a.) Under terms of

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[11]In *Southwest Airlines Co.*, the court of appeals affirmed an injunction in favor of Southwest Airlines Co. enjoining the appellant CAB certified airlines from proceeding in the state court to challenge Southwest's right to provide service at Love Field, as acquired in an earlier federal court proceeding. (546 F. 2d 87, 88.) The court ruled the appellants were bound by the federal decision although they were not parties primarily on the rationale their interests were adequately represented by the City of Dallas, the plaintiff in the original federal suit. (546 F. 2d 97-102.)

the brokerage contract with Munoz, McDougal is required to sell water for export to persons (presumably including Respondents Martinez and de Leon) referred to McDougal's premises by Munoz. (*Id.*)

A close proprietary relationship has existed between the Respondents and McDougal. Obviously, they shared an interest in the outcome of the *McDougal* litigation since the enforceability of the export restriction and, indirectly, the legality of their agreements, was at stake.

Respondents had the opportunity to participate in the state court proceedings and Respondent Munoz actually did so participate with McDougal. (64a-66a.) Munoz also acted as *amicus curiae* before the State Supreme Court and his attorney argued on the side of McDougal before said Court. (67a-84a.)

Respondents should therefore be bound by the decision in *McDougal* under the above referenced rules as participating "non-parties".

Disregarding the aforesaid common interests and participation involving Respondents and McDougal, the Respondents, and indeed the "whole world", should be bound by the *McDougal* decision. This follows because the decision of the California Supreme Court can be said to be a judgment "in rem". (See 47 Am. Jur. 2d, Judgments §§1057 and 1071 for the propositions that a judgment *in rem* is one which is pronounced upon the status of some particular subject matter or rendered in a proceeding instituted against property and that such a judgment is binding "on third persons, or on all parties in interest, or as it is frequently said, on the whole world".)

Although there appears to be a dearth of authority precisely on point, *People v. Gifford*, 54 Cal. App. 182, 201 P. 469 (1921) held that a proceeding (under the Red Light

Abatement Act) to abate a nuisance consisting of the maintenance and use of property in violation of law is a proceeding *in rem* primarily against property.[12] It is submitted the state court proceedings in *McDougal* are analogous.

The county's action charged McDougal was using his land in violation of zoning and in a manner which constituted a public nuisance. The State Supreme Court held, in effect, McDougal was using his parcel in violation of the terms of his use permit, by which he was bound. Thus, the judgment is *in rem* and binding on all.

II.

The Federal Injunction Against Enforcement of the Export Restriction Upheld by the California Supreme Court Violates the Anti-Injunction Act.

The "Anti-Injunction Act", 28 U.S.C. §2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Quoting from *Hill v. Martin*, 296 U.S. 393 (1935), the court of appeals recognized:

> "The prohibition of §265 [the predecessor to the present 28 U.S.C. §2283] is against a stay of 'proceedings in any court of a State'. That term is comprehensive. It includes all steps taken or which may

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[12] *Gifford* (*supra*) involved a public nuisance proceeding for abatement of a public nuisance consisting of a building used for prostitution. The action was dismissed as to the occupant of the building and the owner thereafter argued the plaintiff lost the right to further prosecute the action. The court of appeal rejected the argument stating ". . . it is well to remember that the principal purpose of the action is to abate and prevent a nuisance, it being a proceeding *in rem*, primarily against the property because it is maintained and used in violation of the law." (54 Cal. App. 183, 201 P. 470.)

> be taken in the state court or by its officers from the institution to the close of the final process. . . . It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. 296 U.S. at 403. (footnotes omitted.)'' (A 5.)

The court also referred in its opinion to the decision of this Court in *Vendo Co. v. Lektro-Vend Corporation*, 433 U.S. 623 (1977), wherein the Anti-Injunction Act was applied to prevent a federal court from enjoining a state court proceeding. (A 5.)

However, the court of appeals concluded ''. . . there does not remain a last act necessary to effectuate the California Supreme Court judgment in *County of Imperial v. McDougal*. McDougal has complied with the California Supreme Court ruling that he cannot challenge the no export prohibition and refuses to sell water to those who would export it out of the County. No further proceedings or enforcement provisions of the California Supreme Court remain which may be affected by the district court injunction''. (A 5-6.)

The aforesaid conclusions are obviously erroneous.

Compliance with the judgment of the California Supreme Court requires that McDougal *not* sell water from his premises to the Respondents for export. Commencing with issuance of the district court's injunction, McDougal has openly sold water for export to Mexico in violation of the judgment.

There *are* proceedings which remain open to the state court to enforce the *McDougal* judgment. The superior court's contempt judgment against McDougal is the result of such an enforcement proceeding. (D 1-2.) As a gesture

of comity, said court has withheld execution pending final determination of these federal proceedings. (D 3-4.)

The recent decision of this Court in *Vendo Co. v. Lektro-Vend Corporation*, 433 U.S. 623 (1977) is controlling and requires reversal of the district court's injunction.

In *Vendo*, after nine years of litigation in the Illinois courts, the Supreme Court of Illinois affirmed a money judgment in favor of Vendo Company. Shortly thereafter, Lektro-Vend Corporation petitioned the U.S. District Court to enjoin state proceedings to collect the judgment. The district court granted that request and the court of appeals affirmed.

This Court reversed, finding that the injunction was barred by the Anti-Injunction Act. Specifically, the Court determined the Clayton Act did not authorize the federal injunction under the "expressly authorized" exception to §2283.

In the course of its opinion, the Court emphasized the inflexible nature of the Act stating that "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy". (433 U.S. 630.) The Court also addressed the argument the injunction was necessary in aid of the district court's jurisdiction and rejected it stating "[n]o case of this Court has ever held that an injunction to 'preserve' a case or controversy fits within the 'necessary in aid of its jurisdiction' exception". (433 U.S. 623, 630.)

The Court referred in *Vendo* to the Anti-Injunction Act as an "absolute prohibition against any injunction of any state-court proceedings; unless the injunction falls within one of the three specifically defined exceptions in the Act". (433 U.S. 630.) The Court stated flatly "[it is] clear beyond

cavil that the prohibition is not to be whittled away by judicial improvisation''. (433 U.S. 630 citing *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 514 (1944).)[13]

Respondents' action sought to enjoin the superior court in addition to the county from enforcing the restriction in McDougal's use permit. (22a.) The district court, however, directed its injunction only against the county, its officers and agents. (B 12.)

Authorities have consistently held, however, that a restraint against the parties rather than against the court itself does not make the action any less a violation of the Anti-Injunction Act. Beginning with *Union Central Life Ins. Co. v. McAden, et al.*, 21 F. Supp. 110 (N.D. Tex. 1937), federal courts have criticized this technique. In *H. J. Heinz Co. v. Owens*, 189 F. 2d 505 (9th Cir., 1951), the court of appeals denied a motion for an injunction stating ''[t]his statutory prohibition is not avoided by framing an injunction as a restraint on a party rather than directly against the state court itself.'' (Also see *Furnish v. Board of Medical Examiners*, 257 F. 2d 520 (9th Cir., 1958).)

The present court of appeals also said ''[m]oreover, even if ongoing state proceedings remain, [respondents] here, not being parties in the state suit, may mount a constitutional challenge in federal court against *the law* which is the subject

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[13]Additional cases holding that provisions of the Anti-Injunction Act are to be strictly construed are legion. (See *Mitchum v. Foster*, 407 U.S. 225 (1972); *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970); *International Association of Machinists and Aerospace Workers v. Nix*, 512 F. 2d 125 (5th Cir., 1975); *Carter v. Ogden Corp.*, 524 F. 2d 74 (5th Cir., 1975); *Baine v. City of Danville*, 337 F. 2d 579 (4th Cir., 1964).)

of these state proceedings." (A 6, with emphasis added, citing *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1938).)[14]

Said statement badly misapprehends facts and law.

In *Hale v. Bimco Trading, Inc.* (*supra*), action was brought in the Florida Supreme Court to compel state officials to enforce a statute requiring inspection and fees for imported cement. (306 U.S. 377.) Initially, the Florida court overruled a demurrer challenging the constitutionality of the statute. (*Id.*) However, prior to entry of final judgment by the state court, Appellee Bimco Trading, Inc., a stranger to the state proceedings, commenced a separate action in the federal court to enjoin enforcement of the statute. The district court issued an interlocutory injunction restraining enforcement of the statute. (306 U.S. 377.)

On application by the state officials, the Florida Supreme Court agreed to stay all further proceedings ". . . until the final decision of the Supreme Court of the United States . . ." (*Id.*) This Court thereafter affirmed the lower federal court's injunction against enforcement of the statute. (306 U.S. 380.)

In sharp contrast to *Hale*, the California Supreme Court in *McDougal* finally adjudicated the enforceability of the subject export restriction, and this Court dismissed McDougal's appeal, *before* any action was commenced in the district court.

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[14]The district court likewise concluded the Anti-Injunction Act did not have application because ". . . what is really being sought in this lawsuit is not to enjoin a pending state court proceeding but rather to restrain the enforcement of an allegedly *unconstitutional ordinance*. It seems obvious that this court may, if otherwise appropriate, restrain the operation of an *unconstitutional statute*; surely it does not lose the right to do so merely because the *statute* has been tested in the state courts." (B 2-3, with emphasis added; also citing *Hale v. Bimco Trading Co., supra.*)

The party who brought the federal court challenge in *Hale* was a third party stranger to the state court proceedings. The present Respondents are *not* strangers but purchasers of water from McDougal. Respondent Munoz, McDougal's broker for sale of water in Mexico, participated in the state trial court proceedings and as *amicus curiae* before the California Supreme Court.

The court of appeals and district court relied on *Hale v. Bimco Trading, Inc.* for the proposition third parties may challenge a *statute* or *ordinance* in the federal court even though the enactment has been upheld in an earlier proceeding by a state court. (A 6; B 2-3.) The courts thus recognize third parties who are separately affected by a statute or ordinance may mount a federal challenge even though others have been unsuccessful in prior state court proceedings.

However, the present case does *not* involve a countywide ordinance which, for example, prevents Respondents from exporting ground water outside the county.[15] The federal courts have mischaracterized Respondents' action. Instead of contesting an ordinance or statute, Respondents' action is directed at the export restriction in McDougal's use permit affecting a single parcel.

The factual similarity between *Vendo Co. v. Lektro-Vend Corporation (supra)* and the present case is strong. After five years of litigation in the California courts, the State Supreme Court affirmed the trial court's judgment insofar as it upholds the enforceability of the export restriction in McDougal's permit. Respondents, like the petitioners in

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[15]It is apparent the county has no such ordinance since ground water is currently exported to Mexico from another well in the county located at Ocotillo. (See declaration of Munoz at 64a and trial court findings at 58a.)

Vendo, seek in effect to enjoin enforcement of the final judgment of the State Supreme Court. This Court reversed such an injunction in *Vendo* and should likewise do so here.

III.

Direction by the Court of Appeals for the District Court to Rely on Hughes v. Oklahoma Is Erroneous.

The court of appeals directed that the district court's decision ". . . regarding the merits of the Commerce Clause question should be made in light of *Hughes v. Oklahoma* [.... U.S. .... , 60 L. Ed. 2d 250, 99 S.Ct. 1727 (1979).]" (A 4, fn. 1.) In *Hughes*, this Court found an Oklahoma statute violative of the Commerce Clause which prohibited the export outside of the state of minnows procured from state waters.[16]

Hughes case is distinguishable from the present case and the direction by the court of appeals is inapposite.

After the Oklahoma Court of Criminal Appeals affirmed his conviction, Appellant Hughes successfully appealed to this Court. In contrast, McDougal's attempted direct attack on the California Supreme Court decision failed. This Court dismissed McDougal's appeal for want of a substantial federal question. (434 U.S. 944.)

As shown, Respondents have launched a collateral attack on the State Supreme Court's judgment and their action should be barred by the doctrine of *res judicata* and the Anti-Injunction Act. *Hughes* (*supra*) involved neither of these issues.

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[16]By *Hughes*, this Court overruled *Geer v. Connecticut*, 161 U.S. 519 (1893) which had upheld a statute forbidding the transportation beyond the state of game birds that had been lawfully killed within the state. (60 L. Ed. 2d 255.) The court thereby overturned earlier precedent that a state "owned" wildlife within its boundaries and could therefore prevent the "property" from being removed. (60 L. Ed. 2d 256, 257, 260, 261.)

Hughes v. Oklahoma, like *Hale v. Bimco Trading, Inc.* (*supra*), involved a statute with state-wide application. As discussed above, the present case does not involve any statute or ordinance of general application. The export restriction at issue, as ruled enforceable by the State Supreme Court, affects only a single parcel.

Because the California Supreme Court ruled the restriction in McDougal's use permit enforceable, the federal courts should be precluded from adjudicating any "Commerce Clause question". Assuming *arguendo* Respondents have standing, it is not clear *Hughes v. Oklahoma* should control. This is because the Court has recognized that a state may by exercise of its police power prevent waters from a stream within its boundaries from being diverted outside the state. (*Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908).)

In *Hudson County Water Co. v. McCarter*, (*supra*), the defendant contracted to divert water from the Passaic River, a non-navigable stream in New Jersey, to the City of New York. However, the State of New Jersey enacted a statute providing:

> "[I]t shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh water lake, pond, brook, creek, river, or stream of this state into any other state, for use therein." (209 U.S. 353.)

The State sued to enjoin the intended diversion of water and the defendant contended the enactment was unconstitutional for, among other reasons, impairment of contract and interference with commerce between New Jersey and New York. (209 U.S. 354.) The state appellate court upheld the statute mainly upon the rationale the defendant was a riparian owner with "no right to divert water for more than reasonable distance from the body of the stream or for other

than the well-known ordinary uses, . . .'' (*Id.*) A ''residuum of public ownership [of the stream] in the state'' was also ''infer[red]'' by the state court''. (*Id.*)

While not disagreeing with the state court's rationale, Justice Oliver Wendell Holmes, who wrote the court's opinion, said:

> ''. . . [W]e prefer to put the authority, which cannot be denied to the state, upon a broader ground . . ., since, in our opinion, it is independent of the more or less attenuated residuum of title that the state may be said to possess.
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> * * * *
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> ''The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city without compensation. To that extent it cuts down what otherwise would be the rights of property.
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> * * * *
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> ''It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of land most immediately concerned. (citations omitted.) What it may protect by suit in this court from the interference in the name of

property outside of the state's jurisdiction, one would think that it could protect by statute from interference in the same name within . . .

* * * *

". . ., [I]t appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that, apart from statute, those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights, that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

"We are of opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat

> rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it may keep and give no one reason for its will." (*Hudson County Water Co. v. McCarter* (*supra*) at pages 355-357.)

The district court purported to distinguish *Hudson County Water Co. v. McCarter* by finding "[r]iver water was involved, and the critical factor there was the limited property right in that water possessed by the party desiring to export it. The record does not show any such limit on McDougal's property interest in the water from his well". (B 9.)[17] The court relied instead on *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966), wherein a Texas statute was declared unconstitutional which forbade "drilling a well in Texas and transporting the water outside the State, . . ." (B 8.)

City of Altus, Oklahoma (*supra*) should not, however, be regarded as controlling because the decision turns on provisions of Texas law not here applicable. As will be discussed, California ground water law limits rights of overlying owners in a fashion analogous to those of the "riparian owner" in *Hudson County Water Co. v. McCarter* (*supra*).

In Texas, a landowner has an absolute right to drill wells and to appropriate "captured" underground water. *City of Altus, Oklahoma v. Carr* (*supra*) at 833. The Texas "rule of capture", discussed in *City of Corpus Christi v. City of*

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[17]The court of appeals opinion did not address *Hudson County Water Co. v. McCarter* (*supra*) but instead simply directed the district court to decide the "Commerce Clause question" in accordance with *Hughes v. Oklahoma*. (A 1-8.)

Pleasanton, 154 Tex. 289, 279 S.W. 2d 798 (1955), gives an overlying owner the authority to extract water and to even deplete the basin and requires that injury thereby occurring to neighbors "falls within the description of damnum absque injuria, which cannot be the ground of an action". (255 F. Supp. 840.)

Emphasizing the aforesaid Texas law, the district court in *City of Altus, Oklahoma v. Carr* rejected application of *Hudson County Water Co. v. McCarter* (*supra*); and, instead, relied on natural gas cases in finding the subject enactment violative of the Commerce Clause. (255 F. Supp. 839, 840.) California, however, has a much different set of rules governing use of percolating ground waters, as here involved.[18]

The use of percolating ground waters in California is governed by a "doctrine of correlative rights" which gives each overlying owner a common right to reasonable beneficial use of the water on the overlying land, along with similar rights of all other landowners overlying the same ground water supply. (*Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663, 74 P. 766 (1903); also see *Pasadena v. Alhambra*, 33 Cal. 2d 908, 926, 207 P. 2d 17, 29 (1949).)

Correlative rights are limited to reasonable beneficial uses. *Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist.*, 3 Cal. 2d 489, 529-530, 45 P. 2d 972, 988-989 (1935).[19]

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[18]The nature of the Ocotillo-Coyote Wells Basin, in which McDougal's property is located, is described in a report prepared in November, 1977 by the United States Geological Survey entitled "Digital-Model Evaluation of the Ground-Water Resources in the Ocotillo-Coyote Wells, Imperial County, California". The report was attached as Exhibit "B" to points and authorities supporting the county's second motion for stay of preliminary injunction filed with the district court on June 28, 1978 and is a part of the clerk's record on appeal.

[19]Article X, §2 of the California Constitution requires, in part, that "the water resources of the State be put to beneficial use to the fullest extent of which they are capable, . . ."

Reasonable use on lands overlying the water has preference over diversion of water for use on other lands. (*Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578, 584-585, 77 P. 1113, 1114-1115 (1904).) Only surplus waters are appropriable. (*San Bernardino v. Riverside*, 186 Cal. 7, 20, 198 P. 784, 790 (1921).)

In many respects, the correlative right in California is similar to a riparian right to riparian streams. (*Burr v. Maclay Rancho Water Co.*, 154 Cal. 428, 436, 98 P. 260, 264 (1908); *O'Leary v. Herbert*, 5 Cal. 2d 416, 422, 55 P. 2d 834, 838 (1936).) Contrary to the view of the district court, McDougal's rights *are* therefore limited under California law in a manner akin to the riparian right referred to in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 354.

As argued above, the federal courts do not have jurisdiction to readjudicate the export restriction in McDougal's use permit. If jurisdiction somehow exists, *Hudson County Water Co. v. McCarter* provides a further basis for upholding the restriction on the merits.

CONCLUSION.

The judgment of the court of appeals affirming the injunction granted by the district court should be reversed.

Respectfully submitted,

JAMES H. HARMON,
County Counsel County of Imperial,
Attorney for the Petitioners.